

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



76-7171

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No. 76-7171

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SEA-LAND SERVICE, INC., *et al.*,

*Plaintiffs-Appellants,*

—against—

AETNA INSURANCE COMPANY, *et al.*,

*Defendants-Appellees.*

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ON APPEAL BY SEA-LAND SERVICE, INC. FROM A DECISION OF THE  
UNITED STATES DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

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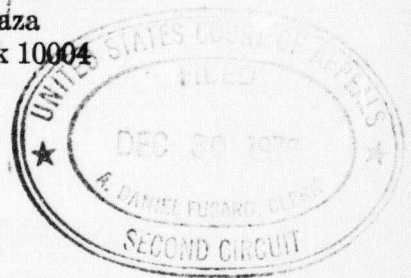
**PETITION OF PLAINTIFFS-APPELLANTS  
FOR REHEARING**

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# United States Court of Appeals

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No. 76-71

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## PETITION OF PLAINTIFFS-APPELLANTS FOR REHEARING

As Judge Friendly pointed out in his dissent, the decision of the majority, dated November 24, 1976, left the crucial issue of this case undecided. We do not know whether the towing attempt, concededly a General Average sacrifice, caused the damage in question. According to Judge Friendly's dissent, there was no dispute between himself and the majority concerning the proper test to be used to determine the crucial causality issue. Yet, the majority let the opinion below stand even though the trial judge used the wrong test to reach his decision. If this erroneous test is used, this Court will have, in essence, re-

versed the United States Supreme Court decision of *Barnard et al. v. Adams, et al.*, 10 How. 270, 51 U.S. 285 (1850).

The error of the majority's opinion may be traced to an inference it improperly drew from the following observation made at page 623:

*There was, however, no finding of fact, that the damage incurred by the shift of the vessel from position A to position B, was caused by the act of sacrifice, the towing.*

(Emphasis added)

The majority inferred from the above observation, that the trial court must have determined that the shift from A to B *was not caused* by the tow. As Judge Friendly pointed out in his dissent, the Trial Court made no such determination, and thus left undecided, the crucial issue in this case. The crucial issue, is, of course,

Did the towing cause the shift in position from A to B?

Before this issue can be decided, the Court must first determine the proper test to use to decide it. Judge Knapp proposed the following, proper test, throughout the trial and during his colloquy with counsel after the trial:

Did the sacrifice, the towing attempt, materially increase the possibility that the vessel would shift from A to B?

(304a)\*

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\* Numbers in parentheses refer to pages of the appendix.

Unfortunately, Judge Knapp did not decide the case on the basis of this test, but left the case undecided by the use of the following, improper test:

Would the vessel more likely than not have shifted roughly to position B regardless of whether the tow had been attempted?

(85a)

In his dissent, Judge Friendly observed that both he and the majority agreed that the former, "materially increased the possibility" test was the correct test of causality in this General Average situation.

Let us examine why the latter test, used in Judge Knapp's opinion is improper, and why its use left the crucial issue undecided. The improper test may be analyzed by separately examining each of its two portions:

(a) . . . It is more likely than not . . .;

and

(b) . . . Regardless of whether the tow had been attempted.

As Judge Friendly pointed out, "more likely than not" only meant that there was a 50.1% chance that the vessel's shift from A to B would have happened had the tow not been attempted. It did not determine whether the tow *increased* the chances of the shift above whatever the chances were while the vessel remained in position A.

Had Judge Knapp, or the majority actually used, and decided the case on the basis of the proper test, he would have had to hold that the bottom damage was General Average damage.

It is hard to understand why or how the towing attempt could not have substantially increased the risk of the shift from A to B. The majority agreed that, only after ten minutes of pulling, did the vessel begin to move from her strand in position A, slip opinion at 621. Thus, the vessel was firmly fixed at A before the tow attempt and probably would not have shifted to B without the attempt. The majority also agreed that, before the vessel left the strand, the tow line broke, and *only after the tow line broke, was the vessel pushed sideways to port by the winds and waves*, slip opinion 621. The tow and the parting of the tow line were conditions precedent to the shift to position B.

Judge Knapp was certainly justified in venturing the following prediction during the after trial colloquy:

. . . It is my guess that I will conclude that the pulling off materially increased the possibility of the shift from A to B.

(304a)

Had he preserved this proper test for use in his opinion, Judge Knapp would have been compelled to hold that the towing attempt did materially increase the possibility of the shift.

When we direct our attention to the latter clause of Judge Knapp's test, we can clearly see that the case was decided with a lack of understanding of the very basis of the law of General Average.

The latter portion of the improper test stated:

. . . that the ship would have shifted roughly to position B, regardless of whether the tow had been attempted.

In other words, if the tow had not been attempted, and if no other means of salvage had been attempted, Judge Knapp thought that the vessel would likely have shifted to Position B and therefore, the shift could not possibly have been a General Average act. However, the very presence of the danger to the vessel while in Position A, made the shift a General Average act.

Judge Knapp recognized the likelihood that the vessel might have been holed and completely lost in Position A.

While the vessel was in her first position immediately after the stranding with her bow embedded in the breakwater, she was subject to obvious perils. She could have been holed and broken where she was, as had another vessel previously, and all might have been lost.

(Plaintiff's proposed finding of fact number 6, incorporated by reference as the Lower Court's finding of fact number 13, 88a)

When viewed in conjunction with the above quoted finding, the latter clause of Judge Knapp's test must have meant that, had the tow not been attempted, it was more likely than not that the vessel would have either shifted to position B and all might have been lost, or that the entire vessel would have been lost in position A.

In other words, because the peril might have caused the damage in question, had the Captain not attempted to save the ship and cargo, Judge Knapp thought the damage could not be General Average. On the contrary because the ship and cargo would have been lost without the salvage efforts, the results of those efforts are, by definition, General Average.

The majority noted that the Lower Court found that "The Master's action in attempting to tow in no way increased the danger to the ship," slip opinion at 628. Of course, it did not increase the danger. The cargo and ship were in danger of being completely lost. How could any action increase the danger beyond total destruction?

Judge Knapp, and the majority, failed to grasp the importance and relevance of the existence of the Peril to our situation. Had Judge Knapp recognized it, and realized its importance, he never would have thought that the fact that damage would have occurred "regardless of whether the tow had been attempted" could defeat a claim for General Average contribution. Of course, damage would have occurred regardless of whether the tow had been attempted. The entire venture would have been lost had the tow not been attempted.

The majority of this Court also appear to have missed the import of this overriding facet of General Average. At page 626 of the slip opinion, the majority referred to Appellant's argument that damage, which was avoidable by some means once the vessel had run aground, was General Average damage, while damage, which was not avoidable once the vessel ran aground, was Particular Average damage. The majority tacitly approved such a test, but referred to the "otherwise would not have occurred" test and found that appellants had not met it. The majority held at Page 627 of the Slip Opinion:

We further agree that if the breaking of the tow line permitted a sideward movement *that would not otherwise have occurred*, the damage would be general average . . .

(Emphasis added)

Later on the same page, the majority repeated the "otherwise would not have occurred" test as follows:

However, the applicability of these cases here depends upon Sea-Land's ability to establish that the tow had permitted the vessel to be pulled free enough to permit a sideward movement which *otherwise would not have occurred*.

(Emphasis added)

The "otherwise would not have occurred" test is just as erroneous as John Knapp's "regardless of whether the tow had been attempted" test. Both tests require that the damage in question be of such a nature that it could not have occurred without the sacrifice. In other words, the damage could not be caused by the energy contained in the General Average Peril.

According to this erroneous theory, the Peril would have to be a strange Peril, which if allowed to run its course, would somehow avoid destroying only the thing sacrificed. Of course, this is contrary to the definition of General Average.

This was never the intent of the ancient doctrine of General Average. As explained in Appellant's Reply Brief, the Supreme Court emphatically rejected such a proposal as long ago as 1850. In reply to an argument that a General Average sacrifice was limited to damage that would not otherwise have occurred, the Supreme Court held as follows:

And [the argument] seems, when more carefully stated, to be this,

that if a common peril was of such a nature, that the 'jactus', or thing cast away to save the rest, would have perished anyhow, or perished inevitably, even if it had not been selected in the place of the whole, there could be no contribution.

If this be the meaning of this proposition, and we can discover no other, *it is a denial of the whole doctrine upon which the claim for general average has its foundation.*

*Barnard v. Adams, et al., supra*, 10 How. 270, 304, 51 U.S. 270, 303 (1850) (Emphasis supplied).

Nothing new or different can ever be found to sacrifice in a General Average situation because, by the very nature of a General Average peril, all will be sacrificed, or lost if the peril is not directed toward a portion of the venture.

Here, the master of the s/s Beauregard directed the energy contained in the Peril, the wind and current, toward the vessel's bottom when he attempted to tow her free. The salvage efforts, which started with the tow, eventually were successful. The cargo, valued at \$3,282,680.68, was saved by expenses and damage sustained by the vessel in the amount of \$763,081.70. The General Average adjuster computed the General Average contribution due the vessel owner for its bottom damage as \$478,816.00. The parties stipulated to the accuracy of this amount (94a). Plaintiffs only ask for their \$478,816.00 proportionate share of the bottom damage, of about \$700,000.

After the trial and the appeal, we are left with the crucial issue of whether the tow caused the damage undecided, and with the law of General Average in a confused state.

Is this Court holding that General Average sacrifices are limited to damages which could not have been caused by the energy contained in the Peril? If this Court intends to so hold, how can it do so in light of the explicit, contrary view expressed by the U.S. Supreme Court in *Bar-nard et al. v. Adams, et al.*, 10 How. 270, 51 U.S. 285 (1850)?

### CONCLUSION

Appellants' petition for a rehearing should be granted. On rehearing, this Court should reverse the Trial Court and award plaintiffs an additional \$478,816.00 as general average contribution for the damage of over \$700,000 sustained by the S.S. BEAUREGARD during the sideward shift.

Respectfully submitted,

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and timely service of three (3) copies of  
the within Petition is hereby admitted this  
30th day of Dec., 1976

Dorinda Meloy, Coesho  
Attorney for  
Rep. Appellars Kennedy.